IN THE HIG COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 70/2005
AND
CIVIL APPLICATION NO. 344/2005

1. Shri Kahinath J. Pai,
aged about 50 years, service,
resident of Khalchawda,
Harmal, Pernem, Goa;

2. Mrs. Pramila Kashinath Pai,
of major age, service;

3. Mr. Vishnu Jaivant Pai,
major of age, business;

4. Mrs. Gulab Vishnu Pai,
major of age, housework;

5. Parvati Sadashiv Pai,
major of age, housework;

6. Reshma Sadashiv Pai,
major of age, student;

7. Vishresh Sadasiv Pai,
major of age, student,
All residents of Khalchawada,
Arambol, Pernem, Goa.

8. Smt. Yeshodabai Jaiwant Pai,
widow of Jaiwant Pai,
aged about 85 years, housewife,
resident of Khalchawada,
Arambol, Pernem, Goa. ..... Appellants.

V/s.

1. Pradip Babuso Vast,
aged about 22 years,
resident of House No.562,

Khalchawada, Harmal, Pedne, Goa.

2. Vilas Subha Vast,
aged about 37 years,
mason resident of House No.559,
Khalchawada, Harmal, Pernem, Goa.

3. Vinayak Sadashiv Vast,
aged about 25 years, Driver, businessman,
resident of House No.563/1,
Khalchawada, Harmal, Pernem, Goa.

4. Laxman alias Lakhu Dashrath Vast,
aged about 28 years, service,
resident of House No. 563,
Khalchawada, Harmal, Pernem, Goa.

5. Chandrakant Mahadev Vast,
aged about 57 years, mason, resident
of House No. 552/C,
Khalchawada, Harmal, Pernem, Goa.

6. All residents of Vast-wada, Khalchawada
and others of Arambol Village
represented by respondents No.1 to 5. ..... Respondents.

Mr. D. J. Pangam, Advocate for the appellants.

Mr. J.P. Mulgaonkar, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 10TH NOVEMBER, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Perused the report.

2. The present appeal is preferred by the appellants-plaintiffs against the Judgment and Order passed by the Ad hoc Additional District Judge, Panaji allowing the appeal of the respondents and setting aside the Judgment and Decree passed by the trial Court with direction that the suit would be remanded to the trial Court for fresh trial according to law and further direction that the trial Court shall consider afresh the suit from the stage of issuing process to the parties under Order 1, Rule 8 of Code of Civil Procedure.

3. The plaintiffs-appellants filed suit on various grounds before the trial Court, seeking various reliefs including the relief of perpetual injunction. The learned trial Judge, after hearing both the parties, on the basis of available evidence on record, decreed the suit partly in terms of prayer clause (a), granting perpetual injunction against the respondents-defendants. While disposing of the suit, prayer clauses (b), (c) and (d) of the plaint came to be rejected. In other words, the suit was partly decreed granting perpetual injunction and rejecting all other reliefs.

The plaintiffs, thereafter, preferred an appeal against the Order rejecting the prayer clauses (b), (c) and (d) in the District Court. However, the learned District Judge, as it appears from the record, came to the conclusion that the Judgment and Decree passed by the lower appellate

Court was bad in law for want of proper service on the defendants and the appeal was allowed and the entire Judgment and Decree of the trial Court came to be set aside with direction for remand of the matter. Hence, the present appeal is preferred against the said order with submission that the entire suit could not have been dismissed by the lower appellate Court when neither any appeal nor any cross objections were filed by the respondents before the lower appellate Court, nor the present appellants were put to notice of the intention of the lower appellate Court to dismiss the entire suit for the grounds mentioned and, therefore, the prayer is made to the effect that the matter be remanded to the District Court for considering these aspects.

4. In support of this submission, the learned Counsel for the appellants has relied on the ruling of the Apex Court in the case of ***Banarasi and ors. vs. Ram Phal ,*** (2003) 9 SCC 606. The Apex Court, in similar situation has observed thus :

> "**10**. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-

objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations :

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent.

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent.

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the

person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross-objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross-objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

12. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross-objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage.

....

> **13.** We are, therefore, of the opinion that in the absence of cross-appeal preferred or cross-objection taken by the plaintiff-respondent the first appellate court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the first appellate court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. ....”

The learned Counsel Mr. Mulgaonkar, appearing on behalf of the respondents, however, submitted that the ratio of the Apex Court Judgment in the case of ***Banarasi and ors. (supra)*** ***Banarasi and ors. case (supra)*** would not be applicable as the lower appellate Court had come to the conclusion that there was no proper notice as contemplated under Order 1, Rule 8 of C.P.Code. However, I prefer to disagree with this submission especially in view of the fact that the record is silent on the aspect whether the appellants were put to notice on this point or not. Therefore, taking into account the ratio laid down by the Apex Court in ***Banarasi and ors. Case (supra),*** the legal position emerges to the effect

that in the absence of cross-appeal preferred or cross-objection taken by the plaintiffs-respondents the first appellate court did not have jurisdiction to modify the decree in the manner in which it had done. Within the scope of appeals preferred by the appellants, the first appellate court could have either allowed the appeal and dismissed the suit filed by the respondents in its entirety or could have deleted the latter part of the decree which granted the decree. It is also to be noted that the Judgment of the lower appellate Court is conspicuous by absence of any indication that the appellants were put to notice about the intention of the lower appellate Court to dismiss the suit in its entirety on the ground that there was no proper service of notice at the trial stage. The lower appellate Court shall, therefore, consider this aspect on remand of the case to it. Therefore, the argument advanced on behalf of the appellants appears to be reasonable and, hence, in my considered view, it is a fit case to grant remand for the limited purpose to determine these aspects as discussed above and taking into consideration the ratio laid down by the Apex Court in ***Banarasi and ors. Case (supra)***.

5. Hence, the appeal is allowed. The Judgment and Order passed by the Ad hoc Additional District Judge, Panaji is, hereby, set aside. The matter is remanded to the Court of Ist Ad hoc Additional District, Panaji for

the limited adjudication of the issues raised and discussed in this appeal, as noted earlier. With this direction, the appeal stands disposed of with no order as to costs. Consequently, the civil application also stands disposed of with no order as to costs.

The parties shall appear before the Ist Ad hoc Additional District Judge, Panaji on 15th December, 2006 at 10 a.m. for the purpose of seeking directions from the lower appellate Court in respect of hearing of the appeal.

P.V. KAKADE, J.

ssm.